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Constitutional Implications of Workmen's Compensation and Choice of Law

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CONSTITUTIONAL IMPLICATIONS OF WORKMEN'S COMPENSATION AND CHOICE OF LAW

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> "In the case of local law, since each of the states of the Union has constitutional authority to make its own law with respect to persons and events within its borders, the full faith and credit clause does not ordinarily require it to substitute for its own law the conflicting law of another state, even though that law is of controlling force in the courts of the state with respect to the same persons and events."[1]

A sovereign state of the United States is subject to the benevolent despotism of the Federal Constitution.[2] In the performance of official functions, limits are placed upon a state's freedom of choice. The equality of a sister state and the dignity of a citizen of the United States are secured by simple provisions of Article IV and Amendment XIV of the United States Constitution. "Full Faith and Credit," "Privileges and Immunities," "Due Process" are magic words which make cooperation as important to the nation as autonomy once was thought to be indispensable to the sovereignty of a state.

The mysterious subject of Conflict of Laws has been disciplined by the substitution of compulsion for comity under the provisions of the Federal Constitution. Choice of law which once was a matter of concern only to the Supreme Court of a state has now become a federal problem subject to judicial review in the Supreme Court of the United States.[3] Full faith and credit to judgments which override local public policy has become an acceptable practice, although one which the Supreme Court will compel, when necessary.[4] More difficult, and not so readily acceptable, is full faith and credit for a statute of a sister state.[5]

The failure to include "Acts" in the original statute implementing the Full Faith and Credit Clause has now been corrected.[6] The difficulties inherent in a requirement of full faith and credit for statutes of a sister state have been revealed in litigation prior and subsequent to the amendment of the implementing statute. Workmen's compensation statutes have provoked the litigation.[7] *Alaska Packers Ass'n. v. Industrial Accident Commission of California*[8] presents a critical and typical problem. A, a

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[1] Chief Justice Stone, in Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 436 (1943).

[2] U.S. CONST. art. VI, § 2. See Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COL. L. R. 1 (1945).

[3] New York Life Insurance Co. v. Dodge, 246 U.S. 357 (1948).

[4] Fauntleroy v. Lum, 210 U.S. 230 (1908).

[5] Pacific Employers Insurance Co. v. Industrial Accident Commission, 306 U.S. 493 (1939).

[6] 28 U.S.C. § 1738 (1948).

[7] Carroll v. Lanza, 349 U.S. 408 (1955); Pacific Employers Insurance Co. v. Industrial Accident Commission, 306 U.S. 493 (1939); Ohio v. Chattanooga Boiler & Tank Co., 289 U.S. 439 (1933); Bradford Electric Light Co. v. Clapper, 286 U.S. 145 (1932).

[8] 294 U.S. 532 (1950).

workman, makes a contract of employment with B, a corporation, in California, the performance of which is to be given in Alaska. Injury occurs in Alaska. The compensation acts, both of California and Alaska, provide that the remedy therein given is exclusive and employment under such statutes constitutes an acceptance of the benefits to the exclusion of other legal remedies against the employer. The benefits under the California act provide more money.

The injured employee makes his claim and is given an award under the California statute. The employer objects to the California award on the grounds that full faith and credit is denied to the statute of Alaska. The Supreme Court of the United States upheld the right of California to make a choice of law that is reasonable, and with the contacts of employment within the state and a return to the state after employment as well as the risk that an injured employee may thereafter be a public charge, the choice of California law as the proper law was sustained. As to the charge of a failure to give full faith and credit to the law of Alaska, the court reasoned that to require California to adopt the Alaska statute would require California to abandon its own statute, which was a relevant statute. A requirement that the forum abandon its own relevant statute would make the foreign law superior to the local law. The purpose of the full faith and credit clause, as the court observed, is to prevent discrimination against the statute of a sister state by another forum, not to make the sister state law superior to that of the forum. Thus, the accommodation of competing systems of law to the solution of a multi-state problem must be resolved by the forum on a reasonable choice of law. The use of full faith and credit for statutes no longer has the absolute quality employed in the enforcement of a judgment, under article IV, section 1, but now must be re-reviewed in terms of due process, as to whether there is an arbitrary taking of liberty of property through the arbitrary application of an improper or irrelevant law.

Troublesome workmen's compensation cases are becoming numerous. The maze through which the lawyer must go to learn how a compensation case will be handled, with constitutional complications added, has many new turns and the risk of becoming lost has increased. The Supreme Court of the United States in the October 1954 term decided a case which makes it appropriate to draw a map, if for no other purpose than to find out where the maze begins. An analysis of the decision, *Carroll v. Lanza*,[9] reveals that Mr. Justice Douglas concluded, for the majority, that Arkansas, the place of injury as well as the forum, was free to permit an employee of a subcontractor to recover for his industrial injury from a general contractor under the local tort law. Due process was his test. Mr. Justice Frankfurter,

[9] 349 U.S. 408 (1955).

for the dissent, concluded that the Supreme Court could not decide the case until a finding was made as to whether the general contractor was included as an "employer" within the meaning of the Missouri Workmen's Compensation Act where the claimant had recovery against his employer, a subcontractor. Missouri was the place of principal employment between the claimant and the subcontractor and the duty in Arkansas was temporary. Full faith and credit is his test. Arkansas had a workmen's compensation statute.

As a result of what appears to be a confusion in the minds of the justices as to the premises from which they reason out the solution of this problem, a restatement of prior conclusions becomes necessary. In a case involving competing compensation statutes of two states, the restriction becomes solely one of due process under the 14th amendment, according to Alaska Packers. In a competition between the common-law policies of the forum and a relevant compensation statute of a sister state, full faith and credit may force the forum to choose the statutory law, according to *Bradford Electric Light Co. v. Clapper.*[10] The law of conflict of laws with its traditional free choice of proper law by the forum may be going into discard in the way of the Laws of Draco and the Institutes of Justinian.

The law of Conflict of Laws has had an ancient and honorable history. The names of Story, Beale, Goodrich and Lorenzen suggest the giants in the field.[11] Their efforts to explain it are heroic. Professor Lorenzen, at the age of 60, thought he had satisfactorily explained its processes in his article *"The Qualification, Classification, or Characterization Problem in the Conflict of Laws."*[12] Ten years later he told his students at the Hastings College of Law that he planned to recast his views along lines which, after much reflection, he thought to be more nearly correct. Except for some thoughts expressed in class, which found their way into student notes with all the risk of error therein contained, his span of life proved too short for the task. The author of this article will attempt to analyze the problem of the *Lanza* case with the techniques remembered by a few students as the ones thought proper by Professor Lorenzen.[13]

Briefly, there are five points of reference in his formula for analysis. 1. *Primary characterization.* This is to be done by locating the problem in

[10] Bradford Electric Light Co. v. Clapper, 286 U.S. 145 (1932).

[11] STORY, CONFLICT OF LAWS (8th ed. 1883); BEALE, CONFLICT OF LAWS (1935); GOODRICH, CONFLICT OF LAWS (3rd ed. 1949); LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS (1947).

[12] 50 YALE L. J. 743 (1941).

[13] Most of the techniques were referred to in the article in note 12 *supra*, but innovations probably never will be verified. Professor Lorenzen stated that he became dissatisfied with his over-all presentation of his views. These notes are offered with apologies for the failure to document all of them, and if experts will say that Professor Lorenzen would never approve, there is no one to dispute them.

one of the broad categories of the law used by the forum such as Torts, Contracts, Negotiable Instruments or Workmen's Compensation, etc.[14] 2. *Choice of connecting factor.* This is the logical and legal basis for identifying the problem with the law of a particular jurisdiction, for example: if the primary characterization is Torts, the normal connecting factor is Place of Injury; if Negotiable Instruments, and the problem is one of Negotiability, Place of Performance may be the connecting factor.[15] 3. *Statement of the relevant law* of the jurisdiction so selected. A finding and a statement is required of the law of the jurisdiction so selected. The term *relevant* foreign law[16] is used to exclude what may be called the procedural law of the locus—since the only foreign law copied or adopted by the forum for the solution of a conflict of laws problem is the substantive law. Distinguishing between substance and procedure, to filter out foreign procedure, is called *secondary characterization.* A forum remains free to use its own procedure. 4. *Application* of the rule of law so stated in point 3 to the facts of the case which will produce a holding by the court that is only tentative. 5. *A review* of the tentative holding reached under point 4 *in the light of the public policy of the forum.*[17] The public policy of the forum includes the provisions of the federal constitution because, of course, the federal constitution is part of the law of each state under the provisions of article VI, the supremacy clause, of the federal constitution. If giving effect to the tentative holding would violate the public policy of the forum, the forum is free, under accepted principles of international law, to reject the application of the relevant foreign law.[18]

The basic premise on which the Lorenzen approach is founded is that the forum will characterize a legal problem by its internal law, e.g., whether a problem is to be called one of contracts or torts when it arises out of an injury suffered by a passenger on a common carrier is to be determined by the internal or local law of the forum and not by the law of the place where the passenger suffered the injury when that occurred in a different legal jurisdiction.

What does the forum do with a legal problem of the same kind when the problem involves a matter which is purely local, i.e., when a native daughter is injured on a locally owned, urban cable car negligently operated by a native son? If the forum characterizes this problem as a Tort, Lorenzen expects that the same characterization will be used when the man without a country is injured due to the negligence of a Nevada engineer crossing the

[14] See note 12 *supra,* at 743.
[15] See note 12 *supra,* at 744, 745, 750.
[16] See note 12 *supra,* at 744.
[17] These are matters which Professor Lorenzen gave only incidental treatment in the article referred to in note 12 *supra.*
[18] Banco de Vizcaya v. Don Alfonso de Borbon Y Austria, 1 K.B. 140 (1935); Ciampittiello v. Campitello, 134 Conn. 51, 54 A.2d 669 (1947); See Nussbaum, *Public Policy and the Political Crisis in Conflict of Laws,* 49 YALE L. J. 1027 (1940).

Great Salt Lake in Utah on a transcontinental train which the injured man boarded in Illinois after purchasing his ticket in New York. If the injured man brings suit in California, the California court will characterize his problem as a tort problem, if that is what it has done for the native daughter.

After Lorenzen has agreed that the forum, the California court, will say that the man without a country and the native daughter each has a right to pursue a remedy in the broad category of the law known as Tort, will their rights be determined by the same law of Torts? The answer, ordinarily, is no. The suit of one of the parties, the native daughter, will be determined by local law. The rights of the other will be determined by the law of Conflict of Laws. The multi-state contacts of the second illustration compels the distinction.[19]

Normally, it would seem proper to inquire at the outset as to why the court of the forum uses one body of law instead of another for the solution of a problem. Local law and Conflict of Laws, both part of the jurisprudence of the forum, often are opposed to each other in content. As is so often true, the obvious is the least often seen and simple problems become complicated because they are not seen. In *Lanza,* A, an employee of B, a subcontractor, sued C, a general contractor, for injuries suffered in the course and scope of his employment in Arkansas. A's contract of employment with B was made in Missouri and his principal duties were there performed. C's contract with B was not made in Missouri. The forum was Arkansas. The majority of the United States Supreme Court held that Arkansas local law was the proper law. The dissent puts its emphasis on the law of Missouri as the one probably binding on the forum under the law of Conflict of Laws. The basic difference between the majority and the dissent in *Lanza* comes from the fact that the majority considers the problem one to be governed by local law free of all foreign law[20] and the dissent believes that the problem belongs in the field of Conflict of Laws.[21] To the dissenters, the use of the local law of the forum to the exclusion of all foreign law is a possible violation of full faith and credit. To the disinterested but moderately informed spectator the application of the local law and the rejection of the foreign law also raises a problem of due process under the 14th amendment.

The first step in the Lorenzen formula has been described as "Primary Characterization." This is the point at which the forum decides into what broad category of the law the problem must be placed. The assumption of Lorenzen is that the problem to be solved is one which belongs to Conflict of Laws. Such was the assumption of the dissenting judges in *Lanza.* The

[19] Rheinstein, *The Place of Wrong: A Study in the Method of Case Law,* 19 TULANE L. R. 4 (1944); Slater v. Mexican National R. Company, 194 U.S. 120 (1904); Cuba Ry. Co. v. Crosby, 222 U.S. 473 (1912).

[20] 349 U.S. 408, 413.

[21] Id. at 420.

distinction between local law and Conflict of Laws is not so easily drawn as once it was. Our people are migratory, our workers are migratory and our problems in compensation cases are as complex as those of the migratory birds for whom the constitution offered no salvation from competing state action until the fullness of the treaty power was recognized by the Supreme Court.[22] Workmen's compensation acts no longer know territorial limits because state legislatures have the authority under their police power to protect their citizens when those citizens go abroad in the scope and course of their master's employment.[23] Overlapping protection is the order of the day. There being no express legislative prohibition, an injured workman may take recovery under the law of one state and subsequently go to another state under whose protection he stands and collect the higher benefits of the second statute, giving credit for benefits already received.[24] Only if an award made under a Workmen's Compensation Act is uncompromisingly final, will the full faith and credit clause prevent a second recovery from the same employer.[25] Thus, the time has come, at least in the field of workmen's compensation, to settle at the outset the question of whether the problem presented is local.

When, as was previously held, facts showed a problem to have multi-state contacts, the forum was required to reject local law and to employ Conflict of Laws for the solution of the problem. Lines were more clearly drawn in those cases where the legal transactions in question had definite contacts that identified them with one state more than another. If a contract of insurance is made in New York, between a resident of New York and a corporation doing business in New York, there is no basis for the application of the law of Texas (which favors the plaintiff over the defendant) to the question of the validity of the contract. A plaintiff, moving to Texas some years later, may use a court of Texas to litigate the question but the court of Texas has no right to apply the substantive law of Texas to solve the problem. The use of the substantive law of Texas, on these facts, constitutes arbitrary conduct,[26] through the application of a non-relevant law which takes away from the defendant rights secured to him under the relevant law of the place of contract.

Workmen's compensation is a category of the law which has about it aspects of contract law, tort law, the police power without territorial limits being imposed upon its use, and insurance. It is, therefore, a legal novelty

[22] Missouri v. Holland, 252 U.S. 416 (1920)

[23] See notes 7 and 8 *supra*. Also, Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469 (1947)

[24] Industrial Commission of Wisconsin v. McCartin, 330 U.S. 622 (1947) A and B had agreed that payment made in the first state was given in partial satisfaction of the full claim.

[25] Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943) An unqualified award made in the first state is res judicata and a bar to a subsequent claim in a second state.

[26] John Hancock Mutual Life Ins. Co. v. Yates, 299 U.S. 178 (1936), See also Home Insurance Co. v. Dick, 281 U.S. 397, (1930); Aetna Life Insurance Co. v. Dunken, 266 U.S. 389 (1924)

and the observable judicial differences are normal in a subject so anomalous. If two jurisdictions have similar workmen's compensation laws and the two jurisdictions have substantial legal contacts with the subject of the litigation, the use of full faith and credit becomes an impossibility under the doctrine of *Alaska Packers* because neither state is duty bound to yield to the other. *Pacific Employers Insurance Co. v. Industrial Accident Commission*,[27] likewise shows that in a conflict between two exclusive workmen's compensation acts, the forum, California, will be free to apply its act although the employee injured in California was only temporarily in that jurisdiction while performing duties for his Massachusetts employer. In the *Lanza* case Mr. Justice Douglas, speaking for the majority, said of *Pacific Employers:*

> "But the Pacific Employers Insurance Co. case teaches that in these personal injury cases the State where the injury occurs needs not be a vassal to the home state and allow only that remedy which the home state has marked as the exclusive one. The State of the forum also has interests to serve and to protect."[28]

Will the legal reaction be different when injury comes to an employee of a subcontractor if there is an additional possible party defendant, such as a general contractor, who may be sued in the forum in tort?

That the plaintiff, A, has a right to sue C in tort when A, an employee, of B, a subcontractor, is injured while B's company is performing under a contract with C, a general contractor, was determined by the majority of the Supreme Court in *Lanza.* A and B entered into the relationship of employee-employer in Missouri. The injury was suffered in Arkansas. A was covered by workmen's compensation through employment by B both outside his home state and in Missouri under the Missouri Act. A was covered in Arkansas under the Arkansas Act by B. The forum for the suit of A versus C was Arkansas.

In a claim made by A against B, under the law of either state, an award made by the forum under its own law, would not be upset by the United States Supreme Court under the full faith and credit clause.[29] The precise question before the court in *Lanza* was whether there is the same freedom to choose the proper law when a suit is brought by A against C.

Payments had been made under the Workmen's Compensation Act of Missouri where a claim was made by A versus B. B did not resist payment of the claim to A and there was not, therefore, a formal award.[30] Had there been a formal award, *Magnolia Petroleum v. Hunt* holds that A could not

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[27] 306 U.S. 493 (1939).

[28] 349 U.S. 408, 412 (1955).

[29] See notes 5 and 8 *supra.*

[30] The Missouri Workmen's Compensation Act requires formal adjudication only "in the event a dispute arises between the employer and the employee regarding the payment of compensation. . . ." Mo. Rev. Stat., §§ 287.400, 287.450 (1949). Cf. McCartin, note 24 *supra.* Payment was made under an agreement, without controversy.

thereafter make a claim against B in Arkansas. The language used by Mr. Chief Justice Stone:

> ". . . when the employee who has recovered compensation for his injury in one state seeks a second recovery in another he may be met by the plea that full faith and credit requires that his demand, which has become res judicata in one state, must be recognized as such in every other."[31]

Mr. Justice Douglas attempts a distinction in *Lanza* by asserting that no final award has been made in *Lanza,* when there was such a final award in *Magnolia.* Apparently, Mr. Justice Douglas is attempting to draw the classical distinction between litigated and unlitigated matters at common law in relation to res judicata. But the payments made under a Workmen's Compensation Act are not voluntary payments. They are paid because there is a statutory duty to pay them. If either party is not satisfied with the statutory allowance it is true that he may ask for an adjudication of a doubtful question by following the provisions of the statute. If an award subsequently is made, it is made because the adjudicating agency finds that the statute is applicable. If payments are made, without dispute, because both parties are satisfied with the terms and applicability of the statute, does it follow that such payments may be disregarded for any legal purpose? If, in a case like *McCartin,* an additional award may be made in a second state surely no one will deny that credit must be allowed for payments made in the first state—whether made under a formal award or through simple compliance with the statute. Such an assertion in *Lanza* brings to mind the words of Mr. Justice Douglas, dissenting, in *Magnolia* ". . . I do not agree with the view that the full faith and credit clause is to be enforced 'only if the outcome pleases us.' "[32] Full faith and credit should be as much of a bar in one case as in the other.[33] Mr. Justice Douglas' attempted distinction between these two cases is unnecessary and confusing. A was not making a claim against B under the Workmen's Compensation Act of Arkansas.

The added question of whether C is a "third person" who may be sued in spite of the workmen's compensation payment seems to be more determinative of the real issue in the case. A recovery based upon a workmen's compensation statute is a recovery arising out of the relationship of employer and employee. No rights except those arising out of the employer-employee relationship are concluded by a workmen's compensation award. Thus, an injury to an employee caused by a third person, for

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[31] See note 25 *supra* at 437.

[32] See note 25 *supra* at 447.

[33] A footnote at 349 U.S. 408, 420 (1955) says, "The dissent agrees with the Court that the Court of Appeals misapplied *Magnolia* to the facts of the case." If C is included within the Workmen's Compensation Act of Missouri, *Magnolia* is entitled to more weight. It is surprising that Mr. Justice Frankfurter accepted Mr. Justice Douglas' distinction between litigated and unlitigated as it related to payments under Workmen's Compensation.

example, a motorist who carelessly drives his automobile over a sidewalk and into a building under construction and makes an employee fall for some distance commits a tort against the employee. His liability will be no less because the employee was injured in the scope and course of his employment and may be entitled to some recovery under workmen's compensation. Assuming that the employee is paid the statutory amount under a compensation act, that payment will entitle the employer to become subrogated to the claim the employee has against the third person but the employee's claim against the third person is not diminished. Nor should it be diminished, because the third person and the employer are neither joint nor concurrent tort feasors. But there is some possibility that a general contractor and a subcontractor are joint and concurrent causes of the industrial injury of the employee. If there is but one claim to which each special employer has contributed, the claimant may not recover more than once. But whether this tort has been committed by a "third person" or the injury has come under circumstances for which a statute makes only an "employer" liable must be resolved by the law of a single state. Will that question be answered by the application of the law of Arkansas[34] or the law of Missouri? In the words of Shakespeare, "That is *the* question." Mr. Justice Douglas and Mr. Justice Frankfurter answer the question differently.

The forum is Arkansas. At the outset, the forum has the right to ask why this problem may not be treated as a local problem. There was no contract of employment entered into in Arkansas—the status of employer-employee between A and B was a continuing one when A performed his duties in Arkansas. But duties arising out of that relationship were performed in Arkansas and the employee was subjected to the risks included within the compulsory coverage law of Arkansas. The injured employee, A, was taken from the state of Arkansas shortly after his injury so that the need for medical treatment was kept at a minimum. A different injury may well have made a transfer of the patient impossible and the interests of the State of Arkansas may well be served by making the compensation statute applicable. Possible support of dependents of the injured party was not likely because Missouri was the home state, but the Act is equally applicable to an unmarried worker. In the light of decided cases, it is not reasonable to assert that Arkansas could not apply its Workmen's Compensation Act to the claim of A against B—if it was the first forum asked so to do.[35] But it was not the first to be asked and payments already have been made under the compensation act of Missouri. Thus the discussion by the court as to the possible applicability of the Arkansas statute is

[34] Although the employee is restricted in his rights against his employer to the Workmen's Compensation Act of Arkansas, ARK. STAT. § 81—1301 (1947), he is under no restriction as to "third persons." *Id.* § 81—1340. See The Baldwin Co. v. Maner, 273 S.W. 2d 28 (Ark. 1954).

[35] See note 5 *supra.*

irrelevant. No claim is made under the Workmen's Compensation Act of Arkansas, to which C is admittedly a stranger. The only reason why Arkansas may not permit a common law recovery by A against C is because the Workmen's Compensation Act of Missouri is a constitutional obstacle to the use of local law by the forum of Arkansas.[36] The suit in Tort is brought by A against C.

Pacific Employers carried the suggestion that the Massachusetts statute could not be used, contrary to the public policy of California, because Congress had not included acts or statutes in the implementation clause for the full faith and credit provisions of article IV. That condition was changed by the Statute of 1948.[37] In the light of the balance of the decision in *Pacific Employers* favoring local public policy over the statute of Massachusetts, that suggestion does not seem to be important. *Bradford Electric v. Clapper* seems to be more nearly in point and Mr. Justice Frankfurter in his dissent says the court is squarely faced with the *Clapper* problem, and to make the interest of Arkansas prevail over that of Missouri would require that *Clapper* be explicitly overruled.[38]

What makes Mr. Justice Frankfurter so positive in his statement is not clear. *Clapper* appears to hold that a Federal Court, exercising jurisdiction on a diversity of citizenship basis and making a decision, therefore, as a neutral forum in place of New Hampshire must, under full faith and credit, accept the workmen's compensation statute of Vermont as a bar to the application of the New Hampshire workmen's compensation statute. The reason given was that the parties involved entered into their contract of employment in Vermont, Vermont was the place of regular employment and the employee was casually employed in New Hampshire at the time of his injury. The net effect of the decision was to send the injured employe back to Vermont to make his claim under the Workmen's Compensation Act of Vermont. If the basis for distinction between *Pacific Employers* and *Clapper* is the temporary nature of the foreign state employment, neither these cases nor related cases have put any emphasis upon this point. The court in *Clapper* may well have felt that the plaintiff was asserting her common law right to sue in tort. Indeed, the foreign employment in *Pacific Employers* was affirmatively stated to be temporary. In *Alaska Packers* there was to be little or no employment in California, the performance of the entire contract was to be in Alaska. Most important, in all of these cases reviewed by Mr. Justice Frankfurter in *Lanza* the competition was between workmen's compensation statutes when there was no question that all the A's and B's involved were covered by the statutes.

[36] See note 10 *supra.*
[37] See note 6 *supra.*
[38] 349 U.S. 408, 421 (1955).

The question here, to repeat, is whether Arkansas may apply its own internal or local law in the case of A versus C, or does the Federal Constitution forbid? If A's claim against C is merged in A's claim against B, it is necessary to inquire as to whether the claim of A against B has been satisfied. By the law of Arkansas C is a "third person" against whom A may assert a claim for his injuries.[39] Again, according to Mr. Justice Douglas ". . . we have the naked question whether the Full Faith and Credit Clause makes Missouri's statute a bar to Arkansas' common law remedy."[40] If A may sue C, on a common law theory in Arkansas, how may the statute of Missouri be used to prevent Arkansas from giving relief which, according to Arkansas law is appropriate? The answer, if there is an answer, must be that B and C are so identified under the law of Missouri that the recovery by A against B in Missouri exempts C from further liability to A.

The majority opinion in *Lanza*, reversing the Court of Appeals, held that the full faith and credit clause did not bar recovery by A against C under the law of Arkansas. Through intervention in Arkansas B and his indemnity company were given a lien on the judgment in favor of A as against C. Thus, the legal effect of payment by B to A, under the laws of Missouri, was recognized. The majority goes on to say:

> "Missouri can make her Compensation Act exclusive, if she chooses, and enforce it as she pleases within her borders. Once that policy is extended into other states, different considerations come into play. Arkansas can adopt Missouri's policy if she likes, or, as the *Pacific Employers Insurance Co.* case teaches, she may supplement it or displace it with another, insofar as remedies within her boundaries are concerned. Were it otherwise, the State where the injury occurred would be powerless to provide any remedies or safeguards to non-resident employees working within its borders. We do not think the Full Faith and Credit Clause demands that subserviency from the State of the injury."[41]

The painful fact is that Arkansas has not provided by statute for any special protection for A against C. The *Pacific Employers* case is not in point and the public policy arguments of equality for the home state statute against the foreign statute, which otherwise would be used, has no relevance because the *Lanza* case does not involve the competition of workmen's compensation statutes of two states. Mr. Justice Douglas said as much when he declared the question before the court was as naked as it is now embarrassing to write it.[42] May the common law policy of the forum override the statutory policy of a sister state? Perhaps the *Clapper* case teaches that the answer is in the negative, although the plaintiff's case was framed under the New Hampshire Employers' Liability and Workmen's Compensation Act.

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[39] See note 34 *supra*, and the opinion of Mr. Justice Douglas at 349 U.S. 408, 410 (1955).
[40] 349 U.S. 408, 411 (1955).
[41] *Id.* at 413-414.
[42] See note 40 *supra*.

The New Hampshire statute contained the somewhat unusual provision that, after the injury, the claimant could waive the workmen's compensation recovery given under the statute and pursue instead a common-law recovery in tort.[43] The claimant, having so elected, was nevertheless required by the United States Supreme Court to abandon the remedy of the New Hampshire law and to use instead the exclusive statutory remedy of Vermont,[44] by which the claimant's decedent on making his contract of employment in Vermont had elected to be bound. The majority in *Clapper*, speaking through Mr. Justice Brandeis, declared that such a result was required under full faith and credit. But Mr. Chief Justice Stone, concurring, states that the Vermont law was applied in New Hampshire on principles of comity. Do the cases cited[45] actually establish more than the proposition that the forum is free to choose the law of either state, so long as there are substantial contacts with the law of the state so chosen? The constitutional test then is more properly due process instead of full faith and credit.

Mr. Justice Frankfurter apparently prefers to reach the same result, to make the forum's choice of Arkansas law a proper one, by way of the conflict of laws route. Assuming that it is established, as Mr. Justice Frankfurter has assumed to be true, that the problem to be solved involves multi-state contacts, the forum is supposed to reject local law and to employ the second body of law found in the forum—namely, conflict of laws. According to Professor Lorenzen, the problem then is subject to primary characterization,[46] i.e., finding into what broad field of the law this problem may be said to fall. By the Lorenzen view, the forum will use its own categories. The claim of A against C, under Arkansas local law is not based upon a statute. Therefore, the approach will be the one known at common-law, and for personal injuries the appropriate category is Tort.

Next the problem must be tied up with the law of a particular jurisdiction. There should be some logical as well as legal basis for this identification. In Tort, the proposition is accepted without much dispute that the place of injury provides the connecting factor.[47] This makes the law of Arkansas applicable and, if this is true, there is no problem of conflict of laws. It is now observable that the basic premise of Mr. Justice Frankfurter that it is a multi-state problem was fallacious and the problem should have been denominated at the outset as local. If, by the law of the forum, this problem cannot be one of workmen's compensation because a general con-

[43] N.H. SESS. LAWS 1911, c. 163, §§ 2, 4.
[44] Vt. Acts 1915, No. 164, Sec. 7.
[45] Alaska Packers Ass'n v. Industrial Accident Commission, 294 U.S. 532 (1950); Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943); Pacific Employers Insurance Co. v. Industrial Accident Commission, 306 U.S. 493 (1939).
[46] 50 YALE L. J. 743, 743 (1941).
[47] Lorenzen, *Tort Liability and the Conflict of Laws*, 47 L. Q. REV. 483 (1931).

tractor is not bound by that Arkansas Act, the only other category in use locally is Tort. Thus, if Mr. Justice Frankfurter wishes to characterize this problem as one in workmen's compensation, then he must use the category employed in Missouri, or the locus. The choice remaining, then, is to admit error or to require the forum to accept the categories used in the other jurisdiction. It is doubtful, under the implications of *Lanza*, that Mr. Justice Frankfurter subscribes to the Lorenzen view of characterization according to the categories of the forum. The Frankfurter characterization makes this a problem in workmen's compensation and the connecting factor is the place of the contract of principal employment. The law of Missouri thus becomes relevant for the solution of the problem.

The third step in the process is to apply the law of Missouri to the fact situation before the court. At this point, Mr. Justice Frankfurter's difficulty increases. The law of Missouri has not been found by the court below. Surveying the case material available in Missouri, there is still a gap in the information which Mr. Justice Frankfurter believes he must possess. There is case material in Missouri which indicates that A may not sue C at common-law because B and C are identified under the Workmen's Compensation Act as parties obliged to insure A against the risk of industrial harm.[48] Likewise, Mr. Justice Frankfurter understands that a person subject to statutory liability cannot be sued as a third party.[49] But the case material has not made clear to him that a prime contractor who has not made a contract in Missouri or who was not performing in Missouri, as he believes to be true of this defendant C, will be bound by the statutes of Missouri. Is Mr. Justice Frankfurter suggesting that a question of legislative jurisdiction and due process is present? Until that doubt is resolved, Mr. Justice Frankfurter believes that the Supreme Court cannot solve the question because they do not have the law of Missouri to apply to the facts. But he anticipates that if the proper tribunal, at a lower level, makes a finding that C is not bound by the Workmen's Compensation Act of Missouri, there will be no constitutional problem before the court, since C is liable to A only at common-law in Missouri and Arkansas will not be forbidden, by the requirement of giving full faith and credit to a sister state statute, to apply the local law. But if the proper lower court finds that C is bound by the workmen's compensation statutes of Missouri, full faith and credit may, or may not, require the forum to reject its local law. That question will be settled when the United States Supreme Court decides whether or not *Clapper* is overruled. Thus, one "readily available alternative short of over-

[48] Bunner v. Patti, 343 Mo. 274, 121 S.W. 2d 153 (1938), which is quoted on p. 424, and Mo. REV. STAT. 1949 quoted on pp. 424-425, to establish that prime contractors are subject to liability under the Missouri Workmen's Compensation Statute.

[49] 349 U.S. 408, 425 (1955).

ruling Clapper"[50] probably requires a finding of fact that the Missouri statute has no bearing upon the problem. There has not been, to date, any suggestion in Supreme Court cases that the common-law of one state must be given full faith and credit in another.[51] If the finding is that A may not recover from C in Missouri under the Workmen's Compensation Act of that state, because C is under no statutory duty to A, judgment should be given for C. Such a conclusion, under the Lorenzen formula is only tentative.

The next step in the Lorenzen formula requires that a review be made of the tentative judgment in the light of the public policy of the forum. There is case material in the forum, Arkansas, which says that C may be sued by A, under the local law of the forum, as a "third person."[52] This is a difference in law. Mere differences in law do not equal differences in public policy.[53] There must be something fundamentally different or something which goes contrary to the mores of the people of the forum, although tolerable in the locus. Gambling is an illustration frequently used.[54] The review of the tentative judgment in the light of the public policy of the forum may, however, lead only to one conclusion, i.e., that the law of the loci must be rejected because it is contrary to the public policy of the forum to give effect to such a law. The cases do not authorize an affirmative substitution of the law of the forum for the solution of the problem.[55] Undesirable as it may seem to the court of the forum, the application of the Lorenzen techniques to the solution of this problem leads to the conclusion that A may not recover. The result for this case, unfortunately, is the logical consequence of the primary characterization according to the law of the loci instead of the law of the forum. It does not provide an "alternative" to a consideration of *Clapper*.

If a contrary finding is made as to the law of Missouri so as to require a holding that C is liable to A, under the Workmen's Compensation Act of Missouri, then *Clapper* is the constitutional obstacle under full faith and credit to a recovery by A against C. This is an answer to Mr. Justice Douglas who has supposed that due process had been satisfied when the forum used its own law because the forum also was the place of injury. Precedent does not support the view of Mr. Justice Douglas that due process is the only relevant constitutional requirement when there is a common-law policy of the forum in conflict with the statutory policy of an affected sister state. Full faith and credit, so applied, will have a double effect. First, if the

[50] *Id.* at 422.
[51] See note 1 *supra*.
[52] See note 34 *supra*.
[53] Loucks v. Standard Oil Co. of New York, 224 N.Y. 99, 120 N.E. 198 (1918).
[54] See note 18 *supra*, particularly Ciampittiello v. Campitello.
[55] Slater v. Mexican National R. Company, 194 U.S. 120 (1904); Coster v. Coster, 289 N.Y. 438, 46 N.E. 2d 509 (1943).

A versus C problem being solved in the forum has been classified as local, the United States Constitution requires a reclassification into Conflict of Laws. Second, the statute of the sister state, again by constitutional compulsion, becomes the proper law for the solution of the legal problem. Related to this second effect, and an important part thereof is this: that the constitutional compulsion to select and use the law of a sister state is likewise a prohibition against a review of the tentative judgment in the light of other public policy of the forum. The purely local law of the forum is completely displaced through constitutional compulsion.[56]

What it appears that Mr. Justice Frankfurter seeks to do is to avoid *Clapper* on a special finding of fact. He hopes to demonstrate on the facts that C, the prime contractor, is not brought within the provisions of the workmen's compensation statute of Missouri because C's contract with B, the subcontractor, has no contacts with Missouri. In the absence of local contacts, the legislature of Missouri lacks jurisdiction over the contract of B and C. This being the condition of the law, the statute has no relevance and there is no basis for the demand that full faith and credit be given to the Missouri statute in Arkansas. Thus construed, the problem is no longer one of full faith and credit. The principal case then does not impinge on *Clapper*, and the holding of the majority will neither affirm nor deny the validity of *Clapper*. On this state of facts, it is difficult if not impossible to observe any difference of opinion between the majority and the dissenters as to the law of *Clapper*. Certainly the majority cannot be charged by the dissent with overruling *Clapper*.

The attack of Mr. Justice Frankfurter continues so as to disassociate the problem in Arkansas from the Workmen's Compensation Act of Arkansas by proof that C is a "third party" in Arkansas. Again, the principal case will not impinge on *Clapper*. The problem has been reduced by his reasoning to a conflict of the common-law policies of two states with which problem *Clapper* has never been identified. With problems of full faith and credit thus eliminated, all that remains is the problem of due process in selection of relevant law. On this there is no discernible difference of view between the forces of Mr. Justice Douglas and those of Mr. Justice Frankfurter. Taking away from the problem all aspects of full faith and credit, the problem will produce an identical solution whether the approach is that of local law or conflict of laws. Eliminating, as both sides do, the applicability of workmen's compensation there is only one primary characterization possible under the traditions of the common law.[57] That characterization will be in the field

[56] First Nat. Bank of Chicago v. United Air Lines, Inc., 342 U.S. 396 (1952); Order of United Commercial Travelers v. Wolfe, 331 U.S. 586 (1947); Sovereign Camp, Woodmen of the World v. Bolin, 305 U.S. 66 (1938); John Hancock Mutual Life Insurance Co. v. Yates, 299 U.S. 178 (1936).

[57] Unless, of course, Mr. Justice Frankfurter is told by the lower court what apparently he does not expect to learn, namely that C is included within the provisions of the Missouri Workmen's Compensation Act.

of Torts. By following common-law tradition once more, the choice of the connecting factor will be place of injury. If by some extraordinary choice of connecting factor the place from which the employee was sent out on the job could be it—namely, Missouri, the result is not likely to be any different. There are sufficient contacts with each state to put the forum in the position of making a choice between them free of the risk of being charged in the Supreme Court of the United States with an arbitrary choice of law in violation of the due process provisions of the Fourteenth Amendment.[58]

Conclusion

Alaska Packers and *Pacific Employers*, as well, teach that full faith and credit will not require a forum to displace its own Workmen's Compensation Act for a similar act of a sister state or territory when the problem presents relatively the same legal contacts with both jurisdictions. *Clapper* teaches that a conflict between the Workmen's Compensation Act of the state of principal employment and the common-law of the forum, which is also the place of injury, or a Workmen's Compensation Act of the forum which permits an employee, after his injury, to elect to follow a common-law remedy will result in a Supreme Court order, under full faith and credit to reject the application of the local law of the forum and to remit the claimant to his administrative remedies of the state of his employment, under an exclusive act by which he is irrevocably bound. *Magnolia* teaches that an award made under a Workmen's Compensation Act of the state of injury is res judicata and entitled to full faith and credit in the state of principal employment, in which a claim is made for the higher benefits provided by the Workmen's Compensation Act of the forum. *McCartin* teaches that if the award made by the state in which injury occurs is described by that state as a partial award with rights remaining in the place of principal employment, the partial award does not equal res judicata of the entire claim, and except for credit for payments already made, will not call for the application of the full faith and credit clause. *Carroll v. Lanza* teaches that a problem involving a common-law claim of an employee of a subcontractor against a general contractor brought in the state in which the employee suffered an injury can become very complicated when the employee is covered by the Workmen's Compensation Acts of the two states involved. The requirement of full faith and credit for statutes of a sister state, sometimes thought to be a part of Constitutional Law from time immemorial and asserted with more certainty since the Act of 1948 amended the implementation statute, will mean no more than it did in *Alaska Packers* where competing statutes are involved, or in *Pacific Employers* where, again, the amended statute was not

[58] See Levy v. Daniels U-Drive Auto Renting Co., Inc., 108 Conn. 333, 143 A. 163 (1928).

before the court. The application of the statute thus selected by the forum will be reviewable only under due process. If the forum can find that no Workmen's Compensation Act is involved because general contractors make their contracts elsewhere than at the place of injury or the place of principal employment and so are not included within the relevant statutes, judgments of state courts based on common-law principles are reviewable only under due process. Due process, in that it permits judicial review, will be as much of a restraint upon the free choice of the forum whether the forum wishes to classify the problem as one solvable by local law or one solvable by Conflict of Laws. Due process being satisfied by the use of a reasonable basis for the choice, it makes no difference whether local law or Conflict of Laws is used by the forum. This is the Q.E.D. offered for the problem of *Carroll v. Lanza.*